

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

WRIT PETITION No.36495 OF 2004,
W.P.M.P.No.43831 OF 2004
AND
W.V.M.P.No.1774 OF 2005

M/s.ICNET Limited,
represented by its Chairman and
Managing Director,
No.18, Norton II Street,
Mandaveli, Chennai-600028. ... Petitioner

Vs.

- 1.The Industries Commissioner and
Director of Industries and Commerce,
Chepauk, Chennai-600005.
- 2.The Deputy Director (E&E),
Dr.VSI Estate,
Chennai-600041. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent comprised in Rc.No.54429/EL3/04, dated 3.11.2004 and quash the same and consequently forbearing the respondents, their men, subordinates, agents or any other persons claiming under them from in any manner interfering with the petitioner's peaceful possession and enjoyment of its property situated in Plot No.163 in DP Industrial Estate, Perungudi, Chennai-96.

* * *

For petitioner : Mr.R.Parthasarathy for
M/s.Satish Prasaran

For respondents: Mr.P.Subramanian,
Spl.Govt.Pleader (Writs)

* * *

O R D E R

By consent of either counsel, the main writ petition itself is taken up for final hearing.

2. The Industries Commissioner and Director of Industries and Commerce, by an order dated 5.1.1984 in the allotment order No.80506/EL1/86, allotted Plot No.163, an extent of 0.710 acres of land at Developed Plot, Industrial Estate, Perungudi Estate, Chennai-96 to the petitioner. Because of some dispute between the petitioner company and the Department of Telecommunications, Government of India, the petitioner company manifested into a major crisis, resulting non-compliance of the conditions enumerated in the allotment order, as well as in the assignment deed. Though for the non-compliance of the conditions in the allotment order, the allotment was cancelled once, again at the request of the petitioner company, re-allotment was made on 25.8.1992 by the order No.39917/EL1/92, followed by deed of assignment dated 24.9.1992. Because of the proceedings initiated by the unsecured creditors, before this Court in Company Petition, an order came to be passed, winding up the petitioner's company, which was questioned, by way of an appeal. In that case, a Scheme of Compromise arrangement, submitted by the petitioner company, was approved elsewhere in August, 2004, thereby stalling the winding up proceedings initiated against the petitioner's company, giving permission to the petitioner, to implement the revival scheme. In view of the proceedings initiated against the petitioner company by the unsecured creditors and because of the fact that the plot allotted was not a developed one - lying in low lying area - the writ petitioner company was unable to complete the construction work, though it had commenced the construction work within six months.

3. The first respondent, violating the principles of natural justice and Articles 14 and 300(A) of the Constitution of India, not issuing notice to the petitioner's company to the residential address of its Director and without giving reasonable and sufficient opportunity for the writ petitioner, passed an order on 3.11.2004, cancelling the allotment order, even forfeiting the EMD paid by the petitioner. Since the respondents have not given proper notice to the petitioner's company, that would amount to total denial of reasonable opportunity. Thus alleging, as if the cancellation order is invalid, the writ petition came to be filed, seeking a Writ of Certiorarified Mandamus, to quash the order dated 3.11.2004 with the consequential relief of forbearing the respondents and their men from in any manner interfering with the petitioner's possession and enjoyment of the property.

4. In the writ petition, by filing W.P.M.P.No.43831 of 2004, interim stay was obtained and aggrieved by the same, the respondents have filed a petition to vacate the interim stay, by filing W.V.M.P.No.1774 of 2005, filing counter also.

5. In the counter, the respondents have stated that the petitioner had violated the conditions of allotment order and therefore, the same was cancelled in 1992; that however, based upon the plea of the petitioner, the same plot was again re-allotted, as per the order dated 25.8.1992; that as per the assignment deed dated 24.9.1992, the allottee should commence the construction within six months and complete the building within two years of allotment, but the petitioner has failed to comply with the same; that the petitioner has not utilised the plot for the purpose for which it was allotted; that the construction, said to have been commenced, fails to satisfy the conditions; that the petitioner, at no point of time, informed the respondents, about the action taken by the Department of Telecommunications or the litigation commenced against the company by the unsecured creditors; that the petitioner had been keeping silent for more than a decade and now is complaining as if the opportunity was denied, which is incorrect; that giving sufficient opportunity, serving the notice, since it was made out that the petitioner had violated the conditions of allotment order, the allotment was canceled in accordance with law and that the grounds alleged for setting aside the cancellation order are imaginary, not available to the petitioner and in this view, the writ petition deserves to be dismissed, vacating the stay also.

6. The petitioner in the reply affidavit, denying the averments in the counter, reiterated the stand, as if the impugned order was passed without giving an opportunity for them.

7. Heard Mr.R.Parthasarathy, learned counsel for the petitioner and Mr.P.Subramanian, learned Special Government Pleader for the respondents.

8. In the year 1984, i.e. on 5.1.1984, admittedly, an extent of 0.710 acres of land in Pot No.163, Industrial Estate, Perungudi Estate, Chennai was allotted to the petitioner, for the purpose of setting up an electrical and electronic unit. The plot was handed over to the allottee/writ petitioner on 2.12.1985. But, the allottee has not utilised the plot till 1992, resulting cancellation of the allotment in the year 1992. However, at the request of the company, re-allotment was made on 25.8.1992, followed by the execution of a deed of assignment on 24.9.1992. As far as the above facts are concerned, there is no dispute.

9. The deed of assignment dated 24.9.1992, imposed certain conditions and the main conditions are:

- "1. The assignee shall not use the plot for any purpose other than that for which it is assigned.
2. The assignee shall commence construction within six months from the date of taking possession of the plot and complete the construction within two years from the said date."

For the purpose of deciding this case, we are not concerned about the other conditions. Clause 15 of the deed of assignment empowers the respondents to take action in case of breach of any of the conditions by the assignee viz. the writ petitioner, which reads:

"Notwithstanding anything hereinbefore contained in the event of a breach of any of these conditions by the assignee, the Director may after giving reasonable notice, cancel this assignment and resume the said plot and on such resumption the said plot shall vest absolutely in the Government free from all encumbrances and the assignee shall be paid for the land only the price as actually paid by the assignee after deducting the penal interest, if any payable under clause 14 above."

10. Admittedly, the clause 2 of the Deed of Assignment viz. 'the assignee shall commence construction within six months from the date of possession and should complete the construction within two years from the said date', has not been complied with strictly, though there was an attempt on the part of the petitioner to put up some construction. It is also now not in dispute that the writ petitioner had put up some construction, which is conceded in paragraph No.3(b) of the counter, which reads:

"The building is now in a very poor shape and it measures 46'-2" x 25'-0" i.e. approximately, 1150 sq.ft. and not 2400 sq.ft as mentioned in the affidavit by the petitioner. This building with plinth area 1150 sq.ft. Was put up in an area of 0.710 acre (30,928 sq.ft). The value of the building in its present condition would not exceed a few thousands rupees."

The above said building is not sufficient to commence the production work, for which purpose the plot was allotted to the allottee/writ petitioner. Thus, it is seen, though the re-allotment was made to the writ petitioner on 25.8.1992, till the date of subsequent cancellation on 3.11.2004, no further construction has been put up and the plot was not put in use, for which purpose it was allotted. In view of the above position, invoking clause 15 of the Deed of Assignment, as extracted above, the first respondent, as per the proceedings dated 3.11.2004 cancelled the allotment, complaining and accusing that the writ petitioner, even after 20 years from the date of taking over possession, failed to fulfil the conditions of the allotment order and Deed of Assignment and therefore, they are entitled to resume possession of the property, which is under challenge in this writ petition.

11. Mr.R.Parthasarathy, the learned counsel for the petitioner, would submit mainly that before passing the impugned order, no notice was served upon the petitioner and no opportunity was also given to them, to explain the delay and in this way, natural justice, which should be made available to any citizen, is denied, which should follow, the cancellation order is not sustainable; that the petitioner was unable to fulfil the conditions because of the crisis came into surface between the Department of Telecommunications once and the petitioner, resulting non-compliance of the conditions, for which the petitioner cannot be accused, as if he had violated the conditions intentionally; that one of the unsecured creditors had filed a case before the Company Court, wherein winding up of the petitioner company was ordered, followed by the Official Liquidator taking over possession of the company and therefore, there was no chance at all for the petitioner to comply with the conditions, which was not considered, while passing the impugned order; that when the non-compliance of the conditions is due to litigation and other problems, which was an impossibility and beyond the control of the petitioner, the cancellation of the allotment is neither just nor proper; that even with the consent of the respondents, the property was hypothecated, which is also one of the subject matters in the Company Petition, not taken into account by the respondents, while passing the impugned order; that after the ex parte order of winding up, when the petitioner approached the Company Court, a scheme of compromise/arrangement submitted by the writ petitioner was finally approved, only in the month of August 2004 permitting the petitioner to implement the revival scheme and at this stage, if the property is resumed, that will work hardship, even affecting the creditor as well as the debtor and without considering the above position, since the impugned order came to be passed, offending the natural justice,

affecting the rights of the writ petitioner and even infringing the revival scheme, the same is liable to be set aside, in order give an opportunity for the writ petitioner to implement the revival scheme and commence and complete the construction so as to commence the business also.

12. In support of the above contentions, the learned counsel took me through the connected proceedings and explained at length, how there was an impossibility for the writ petitioner to complete the work, complying with the conditions and this being the position, the cancellation of allotment must be held unfair and unjust.

13. The learned Special Government Pleader, responding to the above submissions made on behalf of the petitioner, would submit that though originally the possession was handed-over to the allottee in the year 1985, for seven years, the petitioner had not commenced and completed the construction as per the conditions and even after the cancellation of the allotment and re-allotment in the year 1992 also, till the date of the impugned order, the conditions were not complied with; that giving sufficient opportunity and show-cause notice on 29.9.2004, since there was no reply, the impugned order has been passed on merit, without affecting the rights of anybody and in this view, the impugned order dated 3.11.2004 being just and proper, should get the seal of approval of this Court.

14. There is no dispute that the allottee/writ petitioner has not complied with the conditions available in the deed of assignment within the time stipulated and even thereafter also. Therefore, on 29.9.2004, a show-cause notice emanated from the first respondent, directing the petitioner company to submit its explanation within seven days from the date of receipt of the letter, as to why the allotment should not be cancelled, since the petitioner had violated the terms and conditions of the allotment and the deed of assignment. We do not have the materials as to when this notice was served upon the petitioner or when the notice was made available to the petitioner. The impugned order has a reference of the show-cause notice dated 29.9.2004. In the affidavit filed, it is stated that show-cause notice dated 29.9.2004 was left on 30.10.2004 to the petitioner through the watchman of the petitioner company, tantamount to total denial of natural justice (vide grounds). The impugned order has been passed on 3.11.2004. It is denied in paragraph No.6 of the counter wherein it is stated that the letter of communication dated 29.9.2004 and a copy of letter was handed over immediately at the DP to the man available, said to be their watchman, which is denied in the reply counter, as wrong, in paragraph No.9 of the reply affidavit. In the dates and events, furnished before this

Court, it is said that a reply has been received for the show-cause notice dated 29.9.2004 on 5.11.2004, thereby showing that the ground (C) raised in the affidavit of the writ petitioner, as if notice was served on 30.10.2004 must be patently incorrect.

15. It is also further evident from the reply affidavit paragraph No.10, wherein it is stated that the respondents have not even considered the letter dated 1.11.2004 sent by the petitioner to them, explaining in detail the reasons for not using the land allotted for the petitioner, which copy is available in the typed-set at page No.35. Though the reply is dated 1.11.2004, as submitted by the learned counsel for the respondents, it was received only on 5.11.2004. Therefore, the non-consideration of the explanation, offered by the writ petitioner in the communication dated 1.11.2004, may not be a straight ground to set aside the order, as if no opportunity was given. In fact, opportunity was given, but it was not properly utilised by the petitioner in time and the admitted belated explanation, since reached after passing of the cancellation order, the grievance of the writ petitioner may not be genuine at present, whether his claim is liable to be re-considered or not. In this context, we have to see, under what circumstances, the writ petitioner was unable to comply with the conditions and whether those explanations could be accepted, as if the non-compliance is beyond the performance/control of the writ petitioner, thereby affording further opportunity for them, for compliance.

16. An unsecured creditor, filed a Company Petition in C.P.No.279 of 1997, against the writ petitioner wherein an order came to be passed on 20.11.1998, ordering winding up of the petitioner-company. Pursuant to the said order, the writ petitioner was directed to hand over all the assets of the company to the Official Liquidator, with further direction that the writ petitioner may move an application for its revival thereafter. In Company Applications No.1546 to 1548 of 2003, the Managing Director of the petitioner company moved applications to direct the Official Liquidator to deliver the properties to the petitioner, to file a petition for sanction or implementation of the scheme of the compromise, as approved by the secured and unsecured body of creditors and to stay the winding up order dated 20.11.1998. The said Applications were considered and a common order was passed on 19.11.2003, allowing all the said applications, thereby staying the winding up order passed by this Court on 20.11.1998 in C.P.No.279 of 1997, further directing the Official Liquidator, who was in possession of the company assets to hand over possession of the company in liquidation, giving permission to file a petition for sanction of scheme of compromise/revival, as approved by the secured and unsecured creditors with other conditions also. Thereafter, another company

petition came to be filed in C.P.No.82 of 2004 by the Managing Director of the petitioner company, for the approval of scheme of compromise, which was accepted by this Court, as per the order of this Court dated 15.4.2004. Similarly, another application came to be filed in C.A.No.1191 of 2004 in C.P.No.82 of 2004, seeking to exempt the writ petitioner company from the admission criterion for permitting dematerialized forms of trading of its equity shares in the stock exchange, which was sanctioned as per the order dated 22.9.2004. Thus, it is seen, from the year 1997, the writ petitioner company was in problems and in fact, the assets were in the custody of the Official Liquidator and therefore, during the above said relevant period, the writ petitioner had no opportunity to comply with the conditions, though the period is already expired.

17. Even before the action taken by the unsecured creditors, the writ petitioner involved in some problems, pursuant to the nature of business, with the Department of Telecommunications, which paralysed the entire business and the said problem was solved only after seven years or so, as submitted by the learned counsel for the writ petitioner. Therefore, it is seen, from the date of allotment or from the date of re-allotment also, the petitioner, knowingly or unknowingly, on his own or targeted by others, involved in problems and to solve those problems alone, he had spent all these long years and in this view, it appears, he was unable to comply with the conditions and therefore, I feel, an opportunity should be given, once again, to the petitioner, for complying with the terms and conditions enumerated in the Deed of Assignment.

18. Admittedly, after obtaining No Objection Certificate, for raising a loan with TIC, the writ petitioner had borrowed loans, mortgaging the property, which also must be the subject matter of the revival scheme, preceded by liquidation order. For the non-payment of the loan secured, it is said, in the dates and events, auction notice was also issued. If the allotment is cancelled and property is reverted back to the respondents for the non-compliance of the conditions, then, the secured creditor, who advanced loan, also would be in trouble and the revival scheme, approved by the Court, also would run into rough weather, thereby paralysing the entire effort so far put in by the writ petitioner in reviving the company, over-coming the hurdles, for the past several years. In this view also, I am of the considered opinion that an opportunity should be given to the writ petitioner to put forth his explanation properly and satisfy the authorities concerned, seeking further time to comply with the conditions. For that purpose, the writ petition deserves to be accepted.

19. The learned Special Government Pleader, inviting my attention to a case in TAMIL NADU INDUSTRIAL INVESTMENT CORPORATION LTD. vs. MILLENIUM BUSINESS SOLUTIONS PVT. LTD. (2004 (5) CTC 689) would submit that modification of contract by the Court or grant of One Time Settlement or rescheduling of loan amount, which would amount to modification of a contract, has to be done only by the mutual consent of the parties and the Court cannot alter the terms of the contract, which principle is not in dispute. Giving an opportunity to the petitioner to explain, as to under what circumstances he was unable to fulfil the conditions of the allotment, will not amount to substituting a new contract or modifying or altering the deed of assignment. In this view, the decision relied on by the learned Special Government Pleader for the respondents will not come to the aid of the respondents, to reject the claim of the petitioner.

20. From the facts narrated above, it is clear, though there was some slackness on the part of the writ petitioner, in not informing about the Court proceedings to the respondents and not submitting the explanation to the show-cause notice in time, considering the above impossibility established in this case, in performing the conditions imposed in the deed of assignment, in order to give a reasonable opportunity to the petitioner, I am inclined to allow this writ petition, setting aside the impugned cancellation order dated 3.11.2004, thereby to give one more opportunity for the petitioner to comply with the conditions or satisfy the authorities concerned regarding the non-compliance, as the case may be.

In the result, the writ petition is allowed. The impugned order dated 3.11.2004 is set aside. The respondents are directed to give fresh notice to the writ petitioner, giving sufficient and reasonable opportunity to show-cause for non-compliance of the conditions, as per the deed of assignment and pass appropriate orders on merits and in accordance with law. Till such time, the possession of the plot, allotted to the writ petitioner, should not be disturbed. No costs.

Consequently, W.P.M.P.No.43831 of 2004 and W.V.M.P.No.1774 of 2005 are closed.

Rao

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

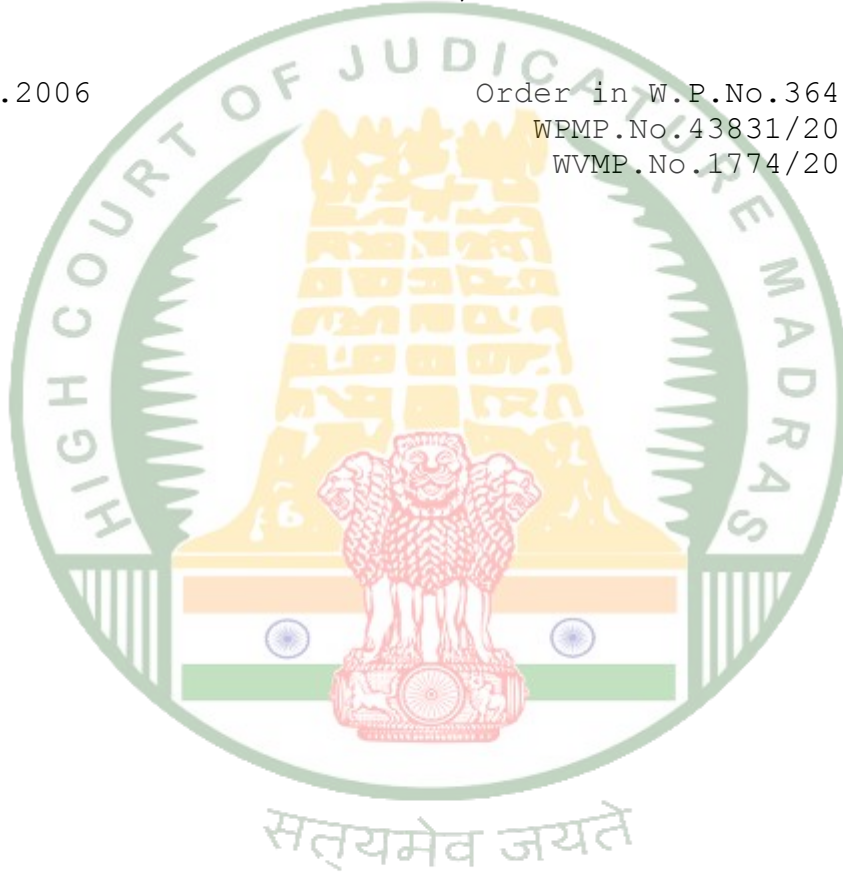
1.The Industries Commissioner and
Director of Industries and Commerce,
Chepauk, Chennai-600005.

2.The Deputy Director (E&E),
Dr.VSI Estate,
Chennai-600041.

+ 1 cc to Mr. Sathish Parasaran, Advocate in SR No. 49191

KSJ(CO)
SR/4.11.2006

Order in W.P.No.36495/2004,
WPMP.No.43831/2004 &
WVMP.No.1774/2005



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